IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 8, 2009 Session

STATE OF TENNESSEE v. STEPHANO L. WEILACKER

Direct Appeal from the Circuit Court for Montgomery County
No. 40600977 Michael R. Jones, Judge

No. M2009-00377-CCA-R3-CD - Filed February 17, 2010

The defendant, Stephano L. Weilacker, was convicted by a Montgomery County Circuit Court jury of aggravated robbery, a Class B felony, and was sentenced to eleven years and six months in the Department of Correction. On appeal, he challenges the sufficiency of the convicting evidence and the trial court's denial of his requested jury instruction. He also presents an argument regarding his defense of duress. After review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the Court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Jordan D. Mathies, Nashville, Tennessee, for the appellant, Stephano L. Weilacker.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Robert J. Nash and Helen O. Young, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises out of the events of a July 2006 robbery of J & D Pawn Shop. As a result, the defendant and two co-defendants, David Selby and Jacobi Allen, were indicted on charges of the especially aggravated robbery of David Choatie, the especially aggravated kidnapping of Shawn Reither, and the aggravated kidnapping of Elizabeth Reither. A jury trial commenced in November 2008 on the sole charge of especially aggravated robbery due to the State's inability to locate and subpoena the Reithers.

State's Proof

David Selby testified that the defendant called and asked him to participate in a robbery. He said that the defendant picked up him and Jacobi Allen in the defendant's white Grand Marquis and drove to J & D Pawn Shop. The three covered their faces with bandanas and entered the store. Inside, the defendant ordered "a lady, a younger man and an older man" to the ground, then pushed the lady close to Selby. The defendant continued to order the older man to the ground, and Selby turned around and started going through the cash register. While Selby was turned, he heard the defendant fire shots. He recalled that the defendant had been trying to get the older man to open the safe in the office and fired a shot in the air and at the older man's head. Meanwhile, the young man, who was down on the floor, kicked toward the defendant, and the defendant shot down at him as if to "say[] quit playing and open up the safe" to the older man. The older man finally opened the safe, allowing Allen to grab the money, and the three ran out of the store.

Selby testified that only the defendant was armed when they entered and when they left the store, and he was armed with a .22 caliber weapon. Selby admitted that he did not see the defendant actually fire the weapon but explained that when he looked over after hearing the shots, the defendant had the gun in the air. Selby stated that the three of them split the proceeds from the robbery equally. Selby said that he weighed approximately 140 pounds at the time of the robbery and was seventeen years old. He acknowledged that he pled guilty to aggravated robbery for his involvement.

On cross-examination, Selby explained that his fingerprints were found on the weapon recovered from the defendant's car because the defendant had handed him the gun and told him to throw it out the window when the police started following them. Selby said that he "wasn't fixing to throw it out the window and . . . wasn't fixing to hold it . . . so [he] stuffed it underneath the seat." He said that was the only time he handled the gun.

Jacobi Allen testified that he was approached by the defendant and Selby about committing a robbery, and they traveled to the pawn shop in the defendant's white Grand Marquis. Allen said that the defendant was the only one with a weapon, a .22 caliber, and they all had something covering their faces. Once inside the store, Allen started searching for money, and the defendant kept everyone quiet and on the ground. Allen heard one or two gunshots and assumed the defendant was shooting in the air to get the older man to move faster. He did not know that the older man had been shot. Allen said that he found the money and they started to head out the door, but the defendant turned around and fired more shots. They got into the car and split up the proceeds. Allen testified that he did not have a firearm in the pawn shop and did not shoot anyone. He admitted that he pled guilty to aggravated robbery and two counts of kidnapping for his involvement.

On cross-examination, Allen testified that he saw Selby with a gun in the car only when the defendant and Selby were "passing [it] back and forth." On redirect examination, Allen stated that he weighed 130 pounds at the time of the robbery and was nineteen years old. He said that the defendant was bigger than him at that time. On recross examination, Allen testified that he wrote the defendant a letter in which he told him that he needed to tell the truth and clear his name with regard to the shooting. He denied writing a particular sentence that could be viewed as a threat to the defendant.

David Choatie, the victim, testified that he was working at J & D Pawn Shop on July 3, 2006, when the store was robbed by three dark-skinned men, wearing bandanas over their faces, caps on their heads, and carrying guns. He said that two of the men were slender and one appeared to weigh over 200 pounds. He recognized the bigger man because he had been in the shop on previous occasions and identified him as the defendant.

The victim testified that the defendant entered the office where he was sitting and put a gun to his head. The defendant demanded money, and the victim gave him the money out of his wallet. The defendant then shot the victim "right beside the head," and the victim got up to show him where the other money was located. He recalled that the defendant shot him again as he was getting on the floor and also kicked him in the back of the neck and head. The victim estimated that the robbers stole between $1100 and $1200.

On cross-examination, the victim testified that the defendant was in the office with him, one of the robbers stayed near the front door where Elizabeth Reither was located, and the other robber was going back and forth between the main room and the office. He said that the defendant and the robber near Elizabeth Reither both had guns. The victim recalled that Shawn Reither was shot in the upper part of the leg.

Michael Pomeroy testified that he was driving by the pawn shop on July 3, 2006, when he noticed three young men dressed in black and white and wearing skull caps exit the store and walk to the side of the building toward a large white car. He described one as a dark-skinned black male and the other two as light-skinned. He said that one of the light-skinned males was larger than the other.

Pomeroy testified that he contacted the police a few days later about what he had seen because "something about it didn't look right[,]" and he saw an article in the newspaper that something had happened at the pawn shop. He acknowledged that he never saw the men's faces.

James Thomas testified that he drove by the pawn shop on July 3, 2006, noticed a white car parked at the side of the building, and, knowing the store had been robbed a few

times before, suspected that another robbery was in progress. He saw two men fighting to get in the passenger side front door of the car and a third man, "a big guy," exit the store and run to the driver's side of the car. The two smaller men were wearing bandanas to cover their faces. Thomas identified the defendant as the "big guy." Thomas stated that he took down the car's license plate number and called 911 to report what he had seen. He then returned to the pawn shop and saw that the victim had been shot.

Officer Scott Beaubien with the Clarksville Police Department testified that he received a call on July 3, 2006, to be on the lookout for a white Grand Marquis. About an hour after receiving the call, Officer Beaubien pulled into the parking lot of a church to speak with another officer just in time to see the Grand Marquis with three occupants drive by. Officer Beaubien pulled out behind the car to confirm the tag number and caught up with it when it pulled into the driveway of a house.

Officer Beaubien testified that the defendant was the driver of the Grand Marquis, Jacobi Allen was in the front passenger seat, and David Selby was in the backseat. He saw a pistol in plain view under the armrest between the front driver and passenger seats. He also found a loaded magazine under the front seat.

The State read the stipulated testimony of Dr. Brian Cotton, who provided medical services to the victim on July 3, 2006, regarding the victim's injuries and the treatment rendered. The testimony provided that the victim received gunshot wounds to the head and abdomen. The head wound was a one-and-a-half-inch complex laceration to the left eyebrow area, which was treated by the removal of the dead or damaged tissue. Examination of the abdominal cavity revealed six punctures to the wall of the small intestine, which was treated by the removal of twelve inches of the victim's small intestine.

Investigator Gary Hodges with the Clarksville Police Department testified that he responded to the scene of the robbery at J & D Pawn Shop on July 3, 2006. Investigator Hodges photographed the scene and retrieved two shell casings from the office floor. He also photographed the defendant's car after it was seized.

Agent Steve Scott with the Tennessee Bureau of Investigation Crime Laboratory testified that he examined the .22 caliber pistol recovered in this case. He noted that a magazine containing six cartridges was submitted with the pistol. He also received two shell casings for analysis and determined that they were fired from that particular .22 caliber pistol.

Detective William Nally with the Clarksville Police Department testified that he was the lead detective in this case and arrived at the pawn shop while medical personnel tended

to the victims. Detective Nally received information from James Thomas regarding the suspect vehicle and put out a be-on-the-lookout call. Once the suspects were apprehended, they were placed in separate interview rooms so they could not communicate with one another. Detective Nally said that approximately $400 was recovered from each suspect when they were captured. Detective Nally said that initial reports from the victims on the scene indicated that each of the robbers had a weapon; however, the physical evidence indicated that only the defendant had a firearm. Detective Nally stated that they had tried unsuccessfully to locate and subpoena Elizabeth and Shawn Reither, the other two victims.

Detective Nally testified that he executed a search warrant on the Grand Marquis during which he retrieved a pair of gray and black gloves, one black glove, and three black tee shirts from the trunk. Detective Nally stated that at the police station, he taped his interview with the defendant, and the defendant gave two written statements. Detective Nally said that the defendant initially denied any participation in or knowledge of the robbery, but, when confronted with some of the evidence, the defendant began to change his answers. The defendant admitted to participating in the robbery but said that the co-defendants approached him and "he just happened to be the driver." He said that the co-defendants gave him a gun.

Detective Nally testified that in the defendant's original statement, he said that Jacobi Allen asked to drive him to the pawn shop to sell DVDs. Detective Nally noted that no DVDs were found in the defendant's car or on the three suspects. Detective Nally recalled that the defendant also said that Allen grabbed the gun from him once they entered the store and shot the two victims. In his later statement, the defendant said that Elizabeth Reither bumped him and the gun discharged, causing him to accidentally shoot Shawn Reither, but he said that Allen took the gun and shot the victim, David Choatie.

Defendant's Proof

The twenty-four-year-old defendant testified on July 3, 2006, he received a call from David Selby asking him to take one of Selby's friends, Jacobi Allen, to sell some DVDs to which the defendant agreed. The defendant, Selby, and Allen proceeded toward the pawn shop, where Selby had him pull up to the side of the building and Allen handed him a gun. Allen told him "to go inside, make sure nobody moves and we'll let you go." The defendant asked Allen if he was joking, and Allen told him to do as he was told and they would let him go. The defendant said that he was reluctant to do what Allen told him, but he was scared because he had been threatened. Allen then handed the defendant a "yellow orange" colored rag to put over his face. The defendant stated that, to the best of his knowledge, the gun he was ordered to use was the only gun amongst the three of them.

The defendant testified that they entered the store, and he told everyone to get down. David Selby started "being rough" with Elizabeth Reither, and Jacobi Allen went in the office where Shawn Reither and the victim were located. The defendant stated that he accidentally shot Shawn Reither when he bumped into a fan. Afterward, Allen forced the victim to open a filing cabinet, and Allen grabbed the money bag. Allen ordered the victim back to the ground and kicked him repeatedly in the back of the head. The defendant stated that Allen threw the money bag to him and grabbed the gun from his hand. The defendant said he heard a gunshot as he was leaving.

The defendant testified that they got into his car, and he drove to a fast-food restaurant at Allen's direction to create an alibi. Along the way, Allen threw DVDs, checks and receipts from the money bag, the victim's wallet, and the bandanas out the window. The defendant said that Allen admitted robbing a gas station a few days earlier and then threatened that the defendant better not "have any intentions [of] snitching." After eating at the fast-food restaurant, the three returned to the car and continued to drive, during which time Allen passed the gun to Selby who proceeded to wipe it down. Soon thereafter, they were pulled over by the police.

On cross-examination, the defendant stated that at the time of the robbery, he was twenty-one years old, six feet and one inch tall, and weighed approximately 280 pounds. He acknowledged that he was bigger and older than both Selby and Allen. The defendant admitted that his trial testimony was different in some respects from his statement.

Following the conclusion of the proof, the jury convicted the defendant of the lesser-included offense of aggravated robbery.

ANALYSIS

I. Sufficiency of the Evidence

The defendant first argues that the evidence was insufficient to sustain his conviction. When reviewing a challenge to the sufficiency of the convicting evidence, we note that the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be

given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A criminal defendant in Tennessee cannot be convicted solely on the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). Furthermore, accomplices cannot corroborate each other. State v. Boxley, 76 S.W.3d 381, 386 (Tenn. Crim. App. 2001). This principle has been described as follows:

> "[T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence is slight and entitled, when standing alone, to but little consideration."

Bigbee, 885 S.W.2d at 803 (quoting State v. Gaylor, 862 S.W.2d 546, 552 (Tenn. Crim.

App. 1992)). Whether sufficient corroboration exists is for the jury to determine. State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001).

Aggravated robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear when accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon. Tenn. Code Ann. § 39-13-402(a)(1) (2006).

The victim's testimony corroborated the testimony of the co-defendants as well as was alone sufficient to support the jury's verdict. The victim testified that the defendant entered the office where he was sitting and put a gun to his head. He said that the defendant demanded money, and the victim gave him the money out of his wallet. The defendant then shot the victim "right beside the head," and the victim got up to show him where the other money was located. The victim recalled that the defendant shot him again as he was getting down on the floor. Based on this evidence, a rational trier of fact could conclude that the defendant committed aggravated robbery.

In his challenge to the sufficiency of the convicting evidence, the defendant seemingly argues that the testimony of the co-defendants was unreliable, there was evidence that there were two guns at the scene, and the co-defendants coerced him into participating in the robbery. However, it was the province of the jury to assess the reliability of the co-defendants' testimony. Moreover, any evidence suggesting that there were two guns at the scene or that the defendant was coerced into participating was presented to the jury, and the jury, as its prerogative, did not accredit such evidence.

II. Jury Instructions

The defendant argues that the trial court erred in failing to give his requested jury instruction on the missing witness rule with regard to Shawn and Elizabeth Reither and a State fingerprint expert because such instruction would have raised an inference that the witnesses would have testified favorably to him. The State argues that nothing in the record supports giving such instruction.

The missing witness rule in Tennessee was explained by our supreme court in State v. Francis, 669 S.W.2d 85 (Tenn. 1984). A party may comment about an absent witness and have the trial court instruct the jury on the failure of an adverse party to call an absent witness when the evidence shows that "'[1] the witness had knowledge of material facts, [2] that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and [3] that the missing witness was available to the process of the Court for trial.'" Id. at 88 (quoting Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979)). The

Francis court added:

> The mere fact that a party fails to produce a particular person who may have some knowledge of the facts involved does not justify application of the inference against him. However, when it can be said with reasonable assurance that it would have been natural for a party to have called the absent witness but for some apprehension about his testimony, an inference may be drawn by the jury that the testimony would have been unfavorable.

Id. at 88-89 (citations omitted).

Upon review, we conclude that the trial court did not err in declining to give a missing witness jury instruction. With regard to Shawn and Elizabeth Reither, the evidence showed through Detective Nally's testimony that he had been unable to locate and subpoena them for trial. At the motion for new trial, the trial court noted that "[the defendant] could never get along with his attorney so that these matters kept getting continued. The reason why those witnesses weren't available is they couldn't be found. That was based on over two years between the crime and the time that they were actually needed in [c]ourt." The Reithers were not available to the process of the trial court for trial; therefore, the missing witness instruction was not appropriate with respect to them. Moreover, we fail to see any relationship that the Reithers had with the State which would naturally incline them to favor the State.

With respect to the fingerprint expert, instead of calling the expert to testify to his findings, the State presented that the fingerprints found on the gun belonged to David Selby through Selby's testimony. In denying the defendant's requested instruction on the missing witness rule, the trial court found that the fingerprint expert was "equally accessible to [the defendant] as it is to the State. All you have to do is issue a subpoena." This court has previously held that to justify a missing witness instruction, the witness must not have been equally available to both parties. See State v. Boyd, 867 S.W.2d 330, 337 (Tenn. Crim. App. 1992); State v. Eldridge, 749 S.W.2d 756, 758 (Tenn. Crim. App. 1988). As found by the trial court, we likewise see no indication in the record that the fingerprint expert was not equally available to the defense. Therefore, the trial court did not err in declining to give a missing witness instruction with respect to the fingerprint expert.

III. Duress

The defendant's final argument on appeal is unclear. At the motion for new trial, which he cites to in his brief as where he properly preserved this issue, he argued that "the defense of duress is a complete defense to the crime of aggravated robbery as a lesser

included offense of especially aggravated robbery." In the argument heading in his brief, he asserts that "the jury finding of insufficient duress defense was contrary to [the] weight of the evidence." Later in his brief, the defendant argues that

> the combined legal effect of different standards of review for instructing on a mixed question of law and fact jury instruction for defense of duress and failure to instruct upon the State Prosecution's Failure to Call a Witness (Inference of Unfavorable Testimony) limit without proper justification the options of the jury for determining the crime for which the defendant can be properly . . . punished.[] It effectively prevented the jury from considering the lesser-included crime of robbery for a conviction offense.

He then lastly asserts that

> the combined facts of missing witnesses and the refused negative inference instruction and the uncorroborated testimony of the accomplices set the stage for undue limitation of the consideration of the jury of the range of punishment authorized by law. This is in part because the jury was not fully instructed on the division of considerations of a mixed law and fact question presented by the duress instruction.

We initially note that neither the jury charge nor the transcript of the jury charge was included in the record before us. However, we glean from the transcript that the court, on its own initiative, stated that it was going to give a charge on duress and the defendant agreed that such was proper. The court noted that the duress charge it was going to give was the pattern charge. There is no indication in the record that the defendant objected to the court giving the pattern charge or ever requested a special charge regarding "the division of considerations of a mixed law and fact question presented by the duress instruction." He cannot now complain of the court's failure to give such charge. On appeal, the defendant has also failed to elucidate the exact charge he thinks the trial court should have given, and, because the jury charge was not included in the record, we are unable to ascertain whether the charge was in some way deficient. See State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993) (noting that the defendant's failure to provide this court with a complete record relevant to the issues presented for review constitutes a waiver of the issue).

In any event, the jury was well within its prerogative in rejecting the defendant's claim that he acted under duress. The evidence showed, among other things, that the defendant was older and bigger than the two co-defendants; the victim identified the defendant as the person who robbed and shot him, which was contrary to the defendant's testimony; the defendant admitted that, to his knowledge, he was the only one with a gun

during the robbery; and the defendant never mentioned that he had acted under duress during his interview with and two statements to the authorities.

Furthermore, as we have already addressed above, the record did not support the giving of a missing witness instruction, and the defendant's contention that the jury was effectively prevented from considering a lesser-included offense cannot stand in light of the fact that the defendant was convicted of a lesser-included offense.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE